Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
Improving Competitive Broadband Access to Multiple Tenant Environments	)	GN Docket No. 17-142
	)	
	)	
Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council	)	MB Docket No. 17-91

REPLY COMMENTS OF THE FIBER BROADBAND ASSOCIATION

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The Fiber Broadband Association ("FBA")[1] hereby submits this reply to comments filed in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking in the above-captioned proceeding to inform the Commission's efforts to "establish effective, clear policy that is carefully tailored to promote broadband deployment" to multiple tenant environments ("MTEs").[2] In its initial comments, FBA informed the Commission: (1) why revenue sharing agreements are in the public interest if they are cost-based and non-discriminatory; (2) why exclusive marketing arrangements are not inherently anticompetitive, but that the Commission should encourage their disclosure; and (3) that state

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1 FBA is a not for profit trade association with more than 250 members, including telecommunications, computing, networking, system integration, engineering, and content-provider companies, as well as traditional service providers, utilities, and municipalities. Its mission is to accelerate deployment of all-fiber access networks by demonstrating how fiber-enabled applications and solutions create value for service providers and their customers, promote economic development, and enhance quality of life. A complete list of FBA members can be found on the organization's website: https://www.fiberbroadband.org/.

2 *Improving Competitive Broadband Access to Multiple Tenant Environments; Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, GN Docket No. 17-142, MB Docket No. 17-91, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 19-65, ¶ 15 (rel. July 12, 2019).

and local mandatory access laws promote deployment and enhance competition. FBA submits these reply comments to address issues raised by other commenters on these matters.[3]

I. THE RECORD SHOWS THAT REVENUE SHARING AGREEMENTS SHOULD BE PERMITTED SO LONG AS THEY ARE COST-BASED AND NON-DISCRIMINATORY.

Among the commenters that addressed revenue sharing agreements, most support FBA's position that such agreements should be permitted if they are cost-based and non-discriminatory.[4] On costs, INCOMPAS said that there has been no showing of "a sufficient economic justification for entering into revenue sharing agreements that exceed the cost of service and result in exclusion of competitors."[5] The Wireless Internet Service Providers Association ("WISPA") agreed, stating that "the Commission should amend its rules to limit revenue sharing agreements between providers and MTE owners/managers to the amount covering the actual costs the MTE owner/manager incurs," and added that "[t]he Commission has long recognized the MTE industry's justification of the use of revenue sharing agreements as a means to compensate the MTE owner/manager for the cost of infrastructure or other building expenses to bring communications services to the building."[6] Both commenters also explained how graduated revenue sharing agreements, in particular, are discriminatory. INCOMPAS

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3 FBA also argued that sale-and-leaseback arrangements should be presumptively prohibited unless shown to be anticompetitive, but does not comment on this matter further.

4 Comments of FBA at 4.

5 Comments of INCOMPAS at 11.

6 Comments of WISPA at 6, 7. *See also* Comments of CenturyLink at 14 ("[T]he Commission should prohibit providers from entering into arrangements that compensate MTE owners for more than their actual cost of enabling service in the MTE and performing any other contractual obligations on the provider's behalf."); Comments of Uniti at 8-9.

pointed out that such agreements incentivize MTE owners to deny entry to new providers unless the new providers match or exceed the benefit paid by the incumbent provider.[7] WISPA said that MTE owners/managers operating under graduated revenue sharing agreements "will not engage in discussions with a qualified competitive provider, claiming that the revenue sharing agreement is exclusive to the incumbent."[8]

Even commenters that cautioned the Commission against limiting revenue sharing agreements spoke only of the agreements in terms of cost recovery and did not provide support for graduated agreements. For example, NCTA – The Internet & Television Association stated, "Revenue sharing is a common mechanism through which service providers compensate building owners for use of the owners' facilities and the costs associated with such use. These agreements are designed to offset the costs that building owners incur installing, maintaining, and upgrading the infrastructure necessary for broadband service."[9] Extenet Systems said that "revenue sharing agreements offset the costs associated with installing, maintaining, and upgrading MTE infrastructure that supports the provision of broadband, communications, and video services to MTE occupants."[10] RealtyCom Partners reiterated its earlier points that monetary consideration in contracts is meant to cover the "capital costs MTE owners bear in providing space and facilities for carrier use" and "ongoing operational costs to MTE owners in performing their obligations under the agreements."[11] While these commenters each argued

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7 Comments of INCOMPAS at 10.

8 Comments of WISPA at 12.

9 Comments of NCTA – The Internet & Television Association at 7.

10 Comments of Extenet Systems at 4.

11 Comments of RealtyCom Partners at 4.

against limitations on revenue sharing agreements,[12] none of them explicitly called for graduated revenue sharing agreements, let alone provided evidence explaining how the alleged benefits of such agreements outweigh their anticompetitive harms.

Commenters that expressed general opposition to revenue sharing agreements also accepted that such agreements can be beneficial when they are non-exclusive and incentivize MTE owners to allow competitive entry. For example, Public Knowledge and New America's Open Technology Institute acknowledged that "non-exclusive revenue-sharing agreements . . . can provide an additional incentive for landlords to facilitate access by competitors."[13]

The Real Estate Associations were the only commenters to explicitly argue that unencumbered and above-cost revenue sharing agreements should be permitted. The main justifications for their argument are that revenue sharing agreements do not create an incentive for anticompetitive behavior,[14] despite record evidence to the contrary,[15] and that preventing above-cost agreements amounts to a subsidy of broadband providers because (1) MTE owners install conduit and other equipment in new buildings at their own expense that providers use and (2) MTE tenants represent customers that providers would otherwise not be able to serve without the existence of the MTE.[16] As FBA stated in its initial comments, the availability of fiber

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12 Comments of NCTA – The Internet & Television Association at 8; Comments of Extenet Systems at 4; Comments of RealtyCom Partners at 4.

13 *See, e.g.*, Comments of Public Knowledge and New America's Open Technology Institute at 10 ("Comments of Public Knowledge").

14 Comments of Real Estate Associations at 78-81.

15 *See, e.g.*, Comments of FBA at 5; Comments of INCOMPAS at 9-10;

16 Comments of Real Estate Associations at 81-82.

broadband in an MTE is financially beneficial to MTE owners.[17] Thus, it could be argued that service from broadband providers subsidizes MTE owners by allowing them to attract more tenants and charge higher rents. Rather than parsing whether MTE owners or broadband providers are receiving a greater benefit from their mutual service to MTE residents, as the Real Estate Associations would have the Commission do, the FCC should only allow cost-based and non-discriminatory revenue sharing agreements, which will promote broadband competition within MTEs for the benefit of consumers.

Regarding disclosure, some commenters supported requiring revenue sharing agreements to be publicly available to ensure they are not anticompetitive,[18] but several other commenters explained that such disclosure would likely be of limited value to tenants and might require providers to reveal sensitive business information. WISPA put it succinctly:

> [P]ublic disclosure of revenue sharing arrangements would not benefit consumers. Tenants are not likely to understand how revenue sharing agreements work, so the disclosure of the existence of any such agreement would be meaningless unless the cost and impact of the revenue sharing agreement is fully disclosed. But even this higher degree of detailed transparency would be difficult for providers to assess, calculate, and disclose for public consumption because it would require undue public disclosure of a provider's confidential business operations.[19]

Another commenter said that disclosure to tenants does not allow them to enforce the Commission's rules or help them resolve violations.[20]

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17 Comments of FBA at 2. The Real Estate Associations acknowledge that the availability of high-quality broadband in their MTEs is beneficial to MTE owners. Comments of Real Estate Associations at 10 ("[MTE] [o]wners *must offer* high quality, reliable broadband service if they are to succeed in competing with . . . other owners.").

18 *See, e.g.*, Comments of CenturyLink at 16.

19 Comments of WISPA at 14 (citation omitted). *See also* Comments of NCTA – The Internet & Television Association at 8-9; Comments of RealtyCom Partners at 6.

20 *See* Comments of Common Networks at 5.

These are valid points and lead to one reasonable approach: if there are allegations regarding the possible or actual existence of a revenue sharing agreement that exceeds costs or otherwise serves to be anticompetitive, the disclosure should be made to the FCC, as FBA proposed in its initial comment.[21] Only the FCC is in a position to both make a determination about whether a revenue sharing agreement is designed to exceed costs (and is therefore anticompetitive) and to maintain the sensitivity of the information that is being disclosed so as not to undermine the business operations of the providers. The FCC also has authority to apply remedial measures for violations so that competition between providers within MTEs can flourish.

II. EXCLUSIVE MARKETING ARRANGEMENTS SHOULD BE PERMITTED SO LONG AS THEY DO NOT INHIBIT TENANTS FROM OBTAINING INFORMATION OR SERVICE FROM OTHER PROVIDERS, AND THE COMMISSION SHOULD ENCOURAGE THEY BE PUBLICLY DISCLOSED

In its initial comments, FBA said that exclusive marketing arrangements can help facilitate deployment of fiber inside MTEs and should be permitted unless shown to be anticompetitive.[22] Some commenters continue to suggest that all exclusive marketing arrangements operate as *de facto* exclusive access arrangements and thus, should be banned.[23] While FBA disagrees, it reiterates that the Commission should make clear to providers that these arrangements cannot inhibit tenants from exercising their ability to obtain information or services from competitive providers, including by inviting those providers into their MTE units to discuss or deploy those services.

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21 Comments of FBA at 4.

22 *Id.* at 8.

23 *See, e.g.*, Comments of INCOMPAS at 17-18.

To ensure exclusive marketing arrangements do not exceed their permissive scope, the Commission should encourage that they be publicly disclosed. Several commenters support disclosure of such arrangements.[24] Others argued that public disclosure would be of limited value. For example, WISPA says that "no disclosure would be effective because MTE owners/managers and tenants may not fully understand exactly what 'exclusive access' means."[25] Tenants do not need to know what exclusive access means; only that an agreement exists that allows only one provider to market to MTE residents within the MTE and that the agreement itself does not prohibit the tenant from seeking information and obtaining service from another provider. If the FCC is presented with evidence that an exclusive marketing arrangement is anticompetitive or otherwise violates the Communications Act, the Commission should exercise its authority to investigate the nature of the arrangement.[26]

III. THE COMMISSION SHOULD NOT DISTURB OR OTHERWISE UNDERMINE THE VALUE OF STATE AND LOCAL MANDATORY ACCESS LAWS

In its initial comments, FBA urged the Commission to not intervene where states and local governments have adopted mandatory access laws.[27] WISPA, while recognizing the value of mandatory access laws, argues that they are harmful to non-traditional providers because they

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24 *See, e.g., Id.* at 18.

25 Comments of WISPA at 22. *See also* Comments of NCTA – The Internet & Television Association at 6-7 (arguing that "a disclosure requirement would not provide consumers with relevant information about the unit they are renting or the broadband services available to them.").

26 Comments of FBA at 9. *See also* Comments of INCOMPAS at 18 ("[T]he Commission must enforce these provisions and find providers in violation of its exclusive access rule if the building owner refuses to provide access to the building based on the exclusive marketing provision.").

27 Comments of FBA at 9.

are not technology neutral.[28] As of now, WISPA asks the Commission to encourage states to adopt technology neutral laws,[29] but FBA cautions the Commission against adopting WISPA's characterization of these laws. Mandatory access laws promote competition and deployment,[30] and suggesting these laws are harmful risks undermining their value. In any event, the FCC's over-the-air reception devices ("OTARD") rule already prohibits laws, regulations, and restrictions imposed by State or local governments or private entities that impair the ability of antenna users to install, maintain, or use over-the-air reception devices,[31] and the Commission is currently undertaking efforts to revise the OTARD rule to further support deployment of fixed wireless infrastructure.[32]

The Real Estate Associations were the only other commenter to address mandatory access laws, saying they are no longer needed to facilitate broadband deployment in MTEs.[33] However, the coalition fails to offer any harm to MTE owners from the existence of these laws and only offers as support conclusory statements about competition among broadband providers for, though not within, MTEs. Yet, there is ample evidence in the record that providers still face barriers to MTE access and that mandatory access laws help them overcome those barriers.

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28 Comments of WISPA at 28-29.

29 *Id.* at 29.

30 Comments of FBA at 9-10; Comments of INCOMPAS at 20 ("Mandatory access laws are enabling competitive providers' entry into MTEs, and giving consumers access to more service offerings from the providers of their choice.").

31 47 CFR § 1.4000.

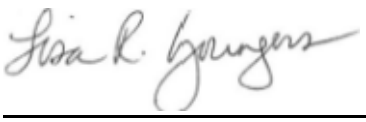
32 *Updating the Commission's Rule for Over-the-Air Reception Devices*, WT Docket No. 19-71, Notice of Proposed Rulemaking, 34 FCC Rcd 2695 (rel. Apr. 12, 2019).

33 Comments of Real Estate Associations at 75.

CONCLUSION

For the reasons set forth above and in FBA's initial comment, the Commission should: (1) permit revenue sharing agreements that are cost-based and non-discriminatory; (2) permit exclusive marketing arrangements so long as they do not inhibit tenants from obtaining information or service from other providers and encourage their disclosure; and (3) decline to disturb or otherwise undermine the value of state and local mandatory access laws.

Respectfully Submitted,



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